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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-191981

DATE: February 14, 1979

MATTER OF: United Telecontrol Electronics, Inc.

DLG 896

[Protest Concerning Award of Contract for Radar Harnesses]

DIGEST:

1. Where RFP contained "desired" delivery schedule, but no required schedule, award may be made to offeror proposing different delivery time if it is within "reasonable" time after desired date. Here offered delivery time was not within reasonable time; therefore award on that basis was improper and protest is sustained.
2. No legal basis exists to allow claim for damages and anticipated profit resulting from failure to receive contract award.

CMA 219

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United Telecontrol Electronics, Inc. (UTE), has protested the award of a contract for radar harnesses to Motorola, Inc. (Motorola), under request for proposals (RFP) N00383-78-R-0864, issued by the Navy Aviation Supply Office (Navy), Philadelphia, Pennsylvania.

DLG 892

The grounds of UTE's protest are:

1. The Government improperly requested best and final offers, since there were no discussions, thus permitting the possibility of a price leak. Since Motorola's price dropped from substantially above to just below UTE's price, in response to the request, it can be assumed that UTE's price was discovered by Motorola.
2. Motorola was permitted to offer a delivery schedule different from that specified in the RFP, while UTE was not afforded such opportunity.
3. The Navy did not notify UTE of the award, as required.

In its response to the protest, the Navy admits that Motorola was permitted to offer a delivery schedule different from the one stated in the RFP, while UTE was

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not given the opportunity. The RFP contained a "desired" time for delivery of September 1978, but neglected to provide for a mandatory or required delivery time. UTE offered to meet the desired delivery schedule. Motorola, however, proposed to "[s]tart delivery 18 weeks ADAD at rate of one unit per week." The contracting officer (C.O.) assumed that "ADAD" meant after date of award document. The C.O. determined that if award were made immediately (March 27, 1978) then Motorola would have to begin delivery on July 31, 1978, but would not finish until November 6, 1978. The C.O. decided that Motorola's being required to deliver some items early would offset any competitive advantage gained by being allowed to deliver some items beyond the end of September. Therefore, the C.O. decided not to hold discussions concerning delivery time with either party.

In fact, award was not made until April 21, 1978 permitting Motorola to begin delivery on September 1, 1978, and continue into December. The C.O. admittedly did not evaluate the effect of this delay in award on the difference between the two delivery schedules.

Delivery schedule, or time for performance, is generally a material factor in a solicitation which is likely to affect price. Development Associates, Inc., B-188416, August 1, 1977, 77-2 CPD 64; Iroquois Research Institute, B-184318, February 23, 1976, 76-1 CPD 123. Invitations for bids (IFB's) and RFP's should clearly inform bidders or offerors of the basis on which their bids or proposals will be evaluated with respect to time of delivery or performance. See 51 Comp. Gen. 518 (1972) 46 Comp. Gen. 745 (1967); Defense Acquisition Regulation (DAR) § 1-305.2(b) (1976 ed.).

We have upheld as legally sufficient awards made under solicitations which specified only "desired" delivery dates, when the offered delivery time was within a "reasonable" time after the desired time. 51 Comp. Gen., supra; 46 Comp. Gen., supra; B-155989; February 24, 1965; B-155035, November 20, 1964. What is considered "reasonable" must be determined from all relevant factors. B-155035, supra.

In this case, we feel that the delivery time offered by Motorola and accepted was not within a reasonable time after the desired time. The desired

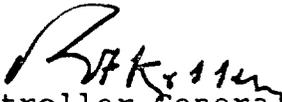
delivery schedule asked for all items to be delivered between September 1 and September 30. Motorola offered a delivery schedule which permitted it to begin delivery in September and continue into December, a period over three times as long as the desired schedule. Accordingly, the protest is sustained.

Since UTE's protest is sustained on this basis, it is unnecessary for us to consider the other issues raised by UTE.

The Navy stated, in its report, that the contract is substantially completed. Therefore, any recommendation for corrective action is rendered impracticable. The Navy did state, however, that the procuring activity has been advised to take corrective action to preclude similar problems in the future.

While, as stated above, we have upheld awards made under solicitations specifying only desired delivery dates, we feel that as a policy matter it is unwise to state only a desired delivery date. Such provisions afford an opportunity for unequal treatment of bidders or offerors, since reasonable men may differ on what constitutes a reasonable delivery time under any given set of circumstances. 46 Comp. Gen., supra. Additionally, the desired effects of competition may be vitiated, since offerors and bidders may be competing on the basis of different terms.

UTE has submitted a claim for damages sustained as a result of not being awarded the contract. This claim includes items which resulted in a lesser absorption of overhead during the probable production life of the contract and anticipated profits. There is no legal basis for allowing an unsuccessful offeror to recover such items. Applied Control Technology, B-190719, September 11, 1978, 78-2 CPD 183. We might also point out that there is no certainty that UTE would have been awarded the contract, if it had been permitted to revise its proposal in response to the relaxed delivery requirements.


Deputy Comptroller General
of the United States